No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

36 pp

QUESTIONS PRESENTED

This case involves a suit to enjoin deportation proceedings commenced by the Immigration and Naturalization Service against six non-resident and two permanent resident aliens. Respondents contend that they were targeted for deportation based on their association with the Popular Front for the Liberation of Palestine; that supporters of other, purportedly similar, organizations were not placed in deportation proceedings; and that the government's efforts to deport respondents constitute selective enforcement of the immigration laws in violation of their First Amendment right to freedom of association. The courts below held that respondents had demonstrated a likelihood of success on their selective enforcement claim and were therefore entitled to preliminary injunctive relief. The questions presented are as follows:

1. Whether the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

2. Whether the courts below erred in concluding that respondents had shown a likelihood of success on their claim of selective enforcement, where the government had reason to believe that respondents had carried out fund-raising activities for a foreign terrorist organization.

PARTIES TO THE PROCEEDINGS

The following Department of Justice officials are petitioners in this Court and were appellants in the court of appeals and defendants in the district court: Janet Reno, Attorney General; Harold Ezell; C.M. McCullough; Doris Meissner, Commissioner, Immigration and Naturalization Service (INS); Ernest E. Gustafson, personally and in his capacity as former District Director of the INS; Richard K. Rogers, District Director, personally and in his capacity as District Director of the INS; Gilbert Reeves, personally and in his capacity as an officer of the INS. The INS itself was also a defendant in the district court and an appellant in the court of appeals, and is a petitioner in this Court. The following were plaintiffs in the district court and appellees in the court of appeals, and are respondents in this Court: American-Arab Anti-Discrimination Committee; Aiad Barakat; Naim Sharif; Khader Musa Hamide; Nuangugi Julie Mungai; Ayman Mustafa Obeid; Amjad Obeid; Michel Ibrahim Shehadeh; and Bashar Amer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued:

Constitution and statutes:

Statutes—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General and the other federal parties, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 119 F.3d 1367. The opinions of the district court (App. 22a-43a, 44a-76a) are unreported. Earlier opinions of the court of appeals (App. 77a-128a, 166a-187a) are reported at 70 F.3d 1045 and 970 F.2d 501. One earlier opinion of the district court (App. 188a-245a) is reported at 714 F. Supp. 1060, and three others (App. 129a-137a, 138a-150a, 151a-165a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 10, 1997. A petition for rehearing was denied on December 23, 1997. App. 246a-252a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, as well as relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, §§ 306(a), 309(c)(1), 110 Stat. 3009-607 to 3009-612, 3009-625, are reprinted at pages 253a-255a of the appendix to this petition.

STATEMENT

1. From its founding in 1967, the Popular Front for the Liberation of Palestine (PFLP) has proclaimed the United States to be one of its principal enemies, along with the State of Israel and the governments of various moderate Arab States. Among its many acts of international terrorism, the PFLP hijacked five aircraft in one weekend in 1970, killed 16 United States citizens at Israel's Lod Airport in 1972, assassinated the United States Ambassador to Lebanon in 1976, and conducted a campaign of attacks against moderate Palestinian officials during the mid-1980s, including assassinations. The organization strenuously opposed the United States in the Gulf War with Iraq, and underscored its opposition to the Madrid peace talks in 1991 by machine-gunning a West Bank passenger bus, injuring five children and killing their mother and the bus driver. The PFLP remains one of the rejectionist terrorist groups violently opposed to the peace process sponsored by the United States in the Middle East. C.A. E.R. 216-219, 230-241.[1]

[1] Evidence introduced by the government in this case demonstrated the extensive nature of the PFLP's activities in the United States. Internal documents seized from the PFLP's U.S. leaders in 1983 and 1984 revealed that the group had established secret cells in this country, which had military capability and were awaiting orders from PFLP headquarters in Syria. The FBI also discovered that, despite its historic animus towards this country, the PFLP has developed and controls a substantial infrastructure in the United States. A principal activity of that infrastructure is concerted fundraising for PFLP operations abroad. C.A. E.R. 13-17, 81-93, 185-190, 212.

2. In January 1987, the Immigration and Naturalization Service (INS) charged eight aliens in Los Angeles with deportability based on their activities on behalf of the PFLP. Those aliens are the respondents here. Two of the respondents (Khader Hamide and Michel Shehadeh) are permanent resident aliens; the other six (Aiad Barakat, Julie Mungai, Amjad Obeid, Ayman Obeid, Naim Sharif, and Bashar Amer) were in this country under temporary visas for studying or visiting.

Evidence introduced by the government in this case showed that respondent Hamide had come to the attention of the Federal Bureau of Investigation (FBI) as a result of investigative activities conducted by a task force considering possible terrorist threats to the 1984 Los Angeles Olympics. C.A. E.R. 3-6. Utilizing confidential sources, leads from other FBI offices, and covert surveillance, the FBI and INS established that Hamide was organizing fundraising events on behalf of the PFLP. *Id.* at 8-9, 22-24, 29-30. The FBI subsequently identified the other seven respondents as among those assisting in the PFLP's fundraising efforts. See *id.* at 30-39, 246-249.[2] Based on the information provided by the FBI, INS District

[2] FBI Special Agents who observed one such fundraising event stated that Hamide had overseen the actual collection of funds, assisted principally by respondent Shehadeh and (in varying degrees) by the other six respondents. C.A. E.R. 33-51, 246-250. Based upon his observation of the proceedings, one Special Agent concluded that "it was apparent that the money collected was collected directly for the PFLP with the intent that it would be utilized in support of the PFLP's terrorist activities." *Id.* at 50. The Special Agent interpreted the event's keynote speech as calling for the assassination of (among others) Zaphir al-Masri, the Palestinian West Bank Mayor of Nablus. *Ibid.* Al-Masri was warned of the threat but was nevertheless killed by the PFLP three weeks later. *Id.* at 44-45, 205.

Counsel Elizabeth Hacker drafted the initial deportation charges against the eight respondents. *Id.* at 251, 258-260.

3. All eight respondents were originally alleged to be deportable because of their advocacy of world communism, see 8 U.S.C. 1251(a)(6)(D), (G)(v), and (H) (1982). The six non-residents were also alleged to be deportable on the ground that they had failed to maintain student status, worked without authorization, or overstayed a visit. See App. 79a-81a. In April 1987, respondents filed suit in federal district court, seeking to have the pending deportation proceedings enjoined. They argued that the provisions basing deportability on advocacy of world communism violated the First Amendment. They also contended that they were the victims of impermissible selective enforcement based on their association with the PFLP. See App. 169a-170a.

Later that month, the INS withdrew the advocacy-of-communism charges against all eight respondents, leaving only the visa violation charges pending against the six non-residents. App. 169a. The INS amended the charges against respondents Hamide and Shehadeh (the permanent resident aliens), alleging that they were deportable under 8 U.S.C. 1251(a)(6)(F)(iii) (1982) because of their meaningful membership in an organization that advocates destruction of property. See App. 81a, 169a. The INS subsequently added a charge that Hamide and Shehadeh were deportable under 8 U.S.C. 1251(a)(6)(F)(ii) (1982) because of their membership in an organization that advocates the unlawful assaulting or killing of government officers. App. 81a. Following amendment of the relevant statutory provisions in 1990, Hamide and Shehadeh were also charged with having engaged in terrorist activities, defined by the Act to include "[t]he soliciting of funds or other things of value

for terrorist activity or for any terrorist organization." 8 U.S.C. 1182(a)(3)(B)(iii)(IV). See App. 4a.[3]

4. On January 7, 1994, the district court preliminarily enjoined the INS from conducting further deportation proceedings against the six non-resident aliens charged with visa violations. App. 138a-150a. For purposes of determining whether prohibited selective enforcement had occurred, the court stated, "the appropriate control group for [respondents] is: 'individuals whom the government knows to be in violation of non-ideological provisions and who associate with terrorist organizations whose views the government endorses or tolerates.'" App. 141a. The court authorized respondents to conduct further discovery bearing on the question whether individuals within that control group had been placed in deportation proceedings, App. 143a-147a, and it entered a preliminary injunction in respondents' favor, App. 148a-150a. The court concluded, however, that it lacked jurisdiction to consider the selective enforcement claim advanced by respondents Hamide and Shehadeh, and therefore granted summary judgment to the government on that claim. App. 129a-137a.

5. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. App. 77a-128a (*AADC II*). At the time of the court's decision in *AADC II*, the Immigration and Nationality Act (INA) provided that "[t]he procedure prescribed by, and all the provisions

---

[3] Although the original charges based on Section 1251(a)(6)(D) had been dropped in 1987, respondents nevertheless pursued their First Amendment challenge to that provision. In 1989 the district court held the provision to be unconstitutional. App. 188a-245a. The court of appeals reversed, see App. 166a-187a (*AADC I*), holding that the challenge to Section 1251(a)(6)(D) was unripe. The court noted, *inter alia*, that respondents "are not now charged under the challenged provisions," and that "if charged and found deportable for violation of the challenged provisions, the [respondents] will have the opportunity to present their constitutional challenges to a court." App. 185a.

of chapter 158 of title 28 [the Hobbs Administrative Orders Review Act], shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation," 8 U.S.C. 1105a(a). The INA also stated that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right." 8 U.S.C. 1105a(c). The Hobbs Act establishes procedures for direct review of agency actions in the court of appeals. It provides, *inter alia*, that the reviewing court may transfer a case to a district court for resolution of ancillary factual issues. 28 U.S.C. 2347(b)(3).

Notwithstanding the INA's provisions for exclusive judicial review in the courts of appeals, the court of appeals concluded that the district court could entertain respondents' selective enforcement challenges and could do so despite the absence of a final order of deportation. The court concluded that because neither the immigration judge nor the Board of Immigration Appeals was authorized to consider a claim of selective enforcement, "selective enforcement claims are not subject to the statutory provision for exclusive review after issuance of a final deportation order." App. 87a. The court also stated that adjudication of a selective enforcement claim would require a factual inquiry that could not be conducted by a court of appeals on review of a final deportation order. The court concluded, in that regard, that a court of appeals in reviewing a final order of deportation would not be authorized to transfer a case to a district court for resolution of pertinent factual issues pursuant to 28 U.S.C. 2347(b)(3). App. 90a-91a; see p. 6, *supra*. The court also held that the district court had erred in declining to exercise jurisdiction over the selective enforcement claims advanced by respondents Hamide and Shehadeh. App. 95a-97a.

The court of appeals then concluded that the six nonresidents had established a likelihood of success on their selective-enforcement challenges to the institution of deportation proceedings. The court upheld as not clearly erroneous the district court's selection of a "control group" comprised of "aliens who have either violated nonideological provisions or are associated with terrorist organizations whose views the government tolerates." App. 106a. The court indicated that in its view, a citizen's association with a disfavored group—even one that engages in unlawful acts—may be punished only if the government can "establish a 'knowing affiliation' and a 'specific intent to further [the group's] illegal aims.'" App. 108a (quoting *Healy* v. *James*, 408 U.S. 169, 186 (1972)).

The court also rejected the contention that the government's conduct of deportation proceedings against aliens should be subject to less stringent constitutional scrutiny than is its regulation of citizens, concluding that "constitutionally protected activities that the Government cannot punish by means of a criminal statute are likewise beyond its reach in a deportation proceeding." App. 112a-113a. It held that respondents "ha[d] provided evidence of disparate impact and of impermissibly motivated enforcement of the immigration laws," and on that basis it affirmed the preliminary injunction entered by the district court. App. 116a.[4]

---

[4] The court of appeals also held that the INS could not consider classified information in ruling on applications for legalization—*i.e.*, adjustment to temporary resident status—filed by respondents Barakat and Sharif pursuant to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a), 100 Stat. 3394 (8 U.S.C. 1255a). App. 116a-127a. We are informed that, following that ruling, respondents Barakat and Sharif were granted legalization. Those respondents consequently are no longer subject to deportation based on the original visa violations.

6. Following the court of appeals' ruling, the government introduced extensive evidence in the district court detailing respondents' activities on behalf of the PFLP, as well as the circumstances leading up to the filing of the deportation charges. That evidence demonstrated, *inter alia*, that the responsible INS official had drafted the initial charges based on the FBI's determination that respondents were engaged in PFLP fundraising activities. See p. 3, *supra*. Despite the newly proffered evidence, the district court denied the government's motion to dissolve the existing injunction against the deportation of the six non-resident respondents and issued a preliminary injunction against the deportation proceedings involving respondents Hamide and Shehadeh. App. 44a-76a.

Relying on the court of appeals' decision on the prior appeal, the district court stated that "the government must show that [respondents] had the specific intent to further the PFLP's unlawful aims" in order to defeat respondents' selective enforcement challenge. App. 49a. The court concluded that the government had failed to carry that burden. It found that the evidence underlying the investigative materials presented to District Counsel Hacker before she made her initial charging decision contained considerable hearsay and possible translation errors. App. 57a. It also held that the evidence, even if taken as true, would not establish that respondents acted with a specific intent to further the PFLP's unlawful activities, because none of the statements made at the fundraising events referred unambiguously to terrorist acts. App. 63a-64a. Because the PFLP engages in both lawful and unlawful activities, the court reasoned, evidence of respondents' participation in PFLP fundraising efforts was insufficient to demonstrate such intent. App. 64a-65a. The court also suggested that the government should have "follow[ed] the trail of the money" in order to

determine whether funds raised by respondents were actually used to support terrorist activities. App. 68a.

7. The government appealed the district court's ruling. While that appeal was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009. See App. 253a-255a. As amended by Section 306(a) of IIRIRA, 8 U.S.C. 1252(g) (Supp. II 1996) states that "[e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." 110 Stat. 3009-612. The government moved in the district court for dismissal of respondents' suit and for vacatur of the existing injunction, arguing that Section 1252(g) barred the district court from exercising jurisdiction over respondents' challenge to the Attorney General's decision to commence proceedings against them. The court denied that motion, concluding that Section 1252(g) "does not reach the constitutional claims at issue in this case." App. 42a-43a.

8. The court of appeals affirmed both the jurisdictional and merits rulings of the district court. App. 1a-21a (*AADC III*).

a. The court held that IIRIRA did not bar the district court from exercising jurisdiction over respondents' claims. The court relied on 8 U.S.C. 1252(f) (Supp. II 1996) (as amended by IIRIRA § 306(a)), which is entitled "Limit on injunctive relief" and provides that no lower court has jurisdiction to enjoin the operation of the relevant statutory provisions "other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." See

App. 9a-10a. While acknowledging that the new Section 1252(g) applied to the instant case, App. 7a-8a, the court stated that IIRIRA "would present serious constitutional problems" if it were construed to bar district court jurisdiction over respondents' suit, App. 12a. It believed that the availability of other avenues of review was uncertain, see App. 12a-15a, and that in any event "*prompt* judicial review of [respondents'] claims was required because violation of [respondents'] First Amendment interests would amount to irreparable injury," App. 15a.

b. The court of appeals affirmed the district court's decision not to vacate the preliminary injunction entered in favor of the six non-resident respondents. App. 17a. The court reasoned that, at the time that injunction was initially entered, the government had elected not to introduce available evidence regarding respondents' fundraising activities, and that the government's subsequent decision to supplement the record provided no basis for vacatur of the injunction. *Ibid.*

c. The court of appeals also affirmed the district court's entry of a preliminary injunction in favor of respondents Hamide and Shehadeh. The court stated that "the central issue is whether the government impermissibly targeted [respondents] due to their affiliation with the PFLP, and did not so target aliens affiliated with other foreign-dominated organizations advocating violence and destruction of property," App. 20a-21a, and that "[t]he record contains evidence of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property," App. 19a. The court construed its decision on the prior appeal as "ma[king] it clear that targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had

the specific intent to pursue illegal group goals." App. 20a. The court also stated that "the government has not challenged the factual finding made by the district court that the INS targeted [respondents] for their mere association with the PELP," and that respondents had therefore made a sufficient showing of improper motive irrespective of their participation in fundraising activities. App. 21a.

9. The court of appeals denied the government's petition for rehearing with suggestion of rehearing en banc, with three judges dissenting. App. 246a-252a. The dissenting judges concluded that IIRIRA unambiguously forecloses all judicial review until the entry of a final order of deportation; that the Act, so construed, creates no genuine constitutional difficulty; and that the panel's ruling is "in tension with the two other circuits which have addressed IIRIRA's jurisdiction-stripping provisions," App. 247a-248a (citing *Auguste* v. *Attorney General*, 118 F.3d 723 (11th Cir. 1997), and *Ramallo* v. *Reno*, 114 F.3d 1210 (D.C. Cir. 1997), petition for cert. pending, No. 97-526).

REASONS FOR GRANTING THE PETITION

More than ten years after the deportation charges in this case were filed, respondents' collateral challenge to the filing of those charges remains pending. Over the course of the litigation, the courts below have flouted clear statutory limitations on their own jurisdiction, and have imposed wholly unwarranted constraints on the Executive Branch's enforcement of the immigration laws.

The courts below erred, to begin with, by permitting this suit to go forward at all. It has long been an integral feature of the Immigration and Nationality Act (INA) that judicial review of deportation proceedings is available only upon the entry of a final order of deportation, and only through the review procedures established by the Act

itself. Congress has recently amended the Act in an effort to eliminate any possible uncertainty regarding that fundamental principle. Both in *AADC II* and *AADC III*, however, the court of appeals disregarded clear jurisdictional limitations and permitted this disruptive litigation to continue. Other courts of appeals, by contrast, have recognized the impropriety of such district court challenges to deportation proceedings.

The disruption of INS enforcement efforts has been exacerbated by the court of appeals' erroneous rulings on the merits of respondents' suit. The responsible INS official drafted the initial deportation charges based on the FBI's determination that respondents were engaged in fundraising activities for a foreign terrorist organization. The court of appeals held, however, that the First Amendment precluded the INS from considering respondents' involvement in those activities in determining how its enforcement discretion would be exercised. The court's remarkable constitutional analysis invites disruptive challenges to the Executive Branch's enforcement of the immigration laws, and to its efforts to remove from the United States aliens who provide material support to terrorist organizations.

Finally, the pernicious effects of the court's decision extend far beyond the sphere of immigration. The court of appeals has held, as a matter of constitutional law, that respondents cannot be "targeted" for deportation based on their PFLP fundraising activities unless (1) they can be shown to have acted with "specific intent" to further the PFLP's unlawful aims, and (2) the government can demonstrate that it has exercised its enforcement discretion in a like fashion with regard to supporters of ostensibly similar organizations. Taken to its logical conclusion, the court's holding would foreclose the imposition of *any* adverse consequence for PFLP fundraising activities where

the specified criteria have not been met. The court's decision thus casts doubt upon the constitutionality of existing statutes and Executive Orders prohibiting U.S. residents—citizens and aliens alike—from furnishing material support to specified hostile governments or foreign terrorist organizations. Review by this Court is warranted to prevent further interference both with the political Branches' enforcement of the immigration laws and with their protection of the national security.

I. A. Before the enactment of IIRIRA, judicial review of final orders of deportation was governed by 8 U.S.C. 1105a. Section 1105a generally provided that review in the courts of appeals pursuant to the Hobbs Act (28 U.S.C. 2341-2351) "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation." 8 U.S.C. 1105a(a). The Act also provided that "[a]n order of deportation or exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right." 8 U.S.C. 1105a(c). "The fundamental purpose behind [Section 1105a(a)] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti* v. *INS*, 375 U.S. 217, 224 (1963); accord *Stone* v. *INS*, 514 U.S. 386, 399 (1995).

Section 1105a defined the procedures to be employed in reviewing a final order of deportation and required exhaustion of administrative remedies before a challenge to a deportation order could be brought. It did not, in so many words, bar judicial review between the filing of an order to show cause by the INS and the entry of a non-final order of deportation by an immigration judge (IJ). It was generally recognized, however, that an alien could not evade the requirements of Section 1105a by filing suit before the

administrative proceedings had concluded. See, *e.g.*, *Massieu* v. *Reno*, 91 F.3d 416, 421 (3d Cir. 1996) (stating, prior to IIRIRA, that "even where an alien is attempting to prevent an exclusion or deportation proceeding from taking place in the first instance and is thus not, strictly speaking, attacking a final order of deportation or exclusion it is well settled that judicial review is precluded if the alien has failed to avail himself of all administrative remedies, one of which is the deportation or exclusion hearing itself") (internal quotation marks omitted).

In *AADC II*, the court of appeals nevertheless concluded that it had jurisdiction to consider respondents' selective enforcement claim. The court explained:

> Both the IJ conducting the deportation proceeding and the Government agree that neither the IJ nor the BIA has jurisdiction to consider a selective enforcement claim during a deportation proceeding. Thus, we conclude that selective enforcement claims are not subject to the statutory provision for exclusive review after issuance of a final deportation order.

App. 87a. That analysis squarely conflicts with the Third Circuit's decision in *Massieu*. The court in *Massieu* held that the plaintiff was not entitled to immediate judicial review of his constitutional challenge to the statutory provision under which he was alleged to be deportable. The court acknowledged that the constitutional claim could not be considered during the administrative proceedings, but nevertheless construed the statutory scheme as deferring judicial review until the entry of a final order of deportation:

> [T]here is no doubt that plaintiff's claims can be afforded meaningful judicial review in this court after exhaustion. Although the immigration judge is not authorized to consider the constitutionality of the statute, this court can hear that challenge upon completion of the administrative proceedings * * *. Although plaintiff would prefer to have his claim heard by this court now rather than after the conclusion of the administrative process, we cannot upset the scheme created by Congress to provide plaintiff with a faster decision.

91 F.3d at 424. See *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) (entertaining constitutional challenge under 8 U.S.C. 1105a, explaining that Section 1105a(a) "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the [deportation] hearing"). Significantly, moreover, the Third Circuit in *Massieu* ordered dismissal of the alien's entire complaint, which included a claim of selective enforcement in retaliation for his exercise of First Amendment rights. See 91 F.3d at 418, 426; *Massieu* v. *Reno*, 915 F. Supp. 681, 689 (D.N. J. 1996).[5]

B. IIRIRA was enacted to strengthen and make explicit the limitations on judicial review under the INA. As amended by Section 306(a)(2) of IIRIRA, 110 Stat. 3009-612, 8 U.S.C. 1252(g) (Supp. II 1996) provides:

---

[5] The court's jurisdictional analysis in *AADC II* was also inconsistent with generally applicable background principles of administrative law. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-245 (1980) (holding that an agency's issuance of an administrative complaint is not "final agency action" subject to judicial review under the Administrative Procedure Act). The Court reached that conclusion despite its evident assumption that the propriety of the initial charging decision would not be subject to further administrative review. *Id.* at 243. The Court also rejected the plaintiff's contention that it would suffer irreparable harm if judicial review were deferred, explaining that "the expense and annoyance of litigation is part of the social burden of living under government." *Id.* at 244 (internal quotation marks omitted).

Exclusive jurisdiction

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

Section 306(c)(1) of IIRIRA provides that the new Section 1252(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." 110 Stat. 3009-612. The court in *AADC III* correctly held that the new Section 1252(g) applies to cases, like the instant suit, that were pending on IIRIRA's effective date. App. 7a-8a; accord *Ramallo* v. *Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997), petition for cert. pending, No. 97-526; *Lalani* v. *Perryman*, 105 F.3d 334, 336 (7th Cir. 1997).

As we explain above, there was no statutory basis for respondents' suit even before IIRIRA was enacted. Section 1252(g) is therefore properly understood not as an attempt to divest the federal courts of jurisdiction they previously possessed, but as an effort to make absolutely clear what should have been apparent all along: that review of the INS's conduct of deportation proceedings is available *only* under the INA provisions specifically provided for that purpose. Both before and after passage of IIRIRA, the relevant statutory provisions have required the entry of a final order of deportation as an absolute prerequisite to judicial review of the deportation process.[6]

---

[6] Thus, in addition to Section 1252(g), 8 U.S.C. 1252(b)(9) (Supp. II 1996) provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."

C. The court of appeals in *AADC III* offered three basic justifications for permitting respondents' suit to go forward. Those justifications are without merit.

1. The court of appeals relied in part on 8 U.S.C. 1252(f) (Supp. II 1996), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. 1221-1231 (Supp. II 1996), as amended by IIRIRA] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." The court of appeals concluded that "[b]ecause this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over the [respondents'] claims." App. 10a.

The plain text of Section 1252(f) will not support that reading. Section 1252(f) is entitled "Limit on injunctive relief" and is by its terms a *restriction* on the reviewing court's remedial authority rather than an affirmative grant of jurisdiction. See App. 249a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc). That Section makes clear, most obviously, that a court may not under any circumstances grant classwide injunctive relief against the operation of any provision contained in Sections 1221-1231. But nothing in Section 1252(f) empowers a federal court to adjudicate a suit that does not fall under some independent grant of jurisdictional authority.

2. The court of appeals also believed that respondents would be unable to obtain effective judicial review of their selective enforcement claims upon entry of a final order of deportation. The court explained that "a selective enforcement claim is not purely legal but rather requires factual proof," and that "the factual record necessary to the ad-

judication of such a claim would not be available to a federal court reviewing a final deportation order." App. 12a. We disagree.

Both before and after the enactment of IIRIRA, judicial review of a final order of deportation has been governed by the provisions of the Hobbs Act, 28 U.S.C. 2341-2351. See 8 U.S.C. 1105a(a); 8 U.S.C. 1252(a)(1) (Supp. II 1996). The Hobbs Act specifically provides that the reviewing court of appeals may transfer a case to a district court for the resolution of pertinent issues of material fact that were not resolved (and were not required to be resolved) by the agency itself. 28 U.S.C. 2347(b)(3). If disposition of a selective enforcement claim requires resolution of factual issues not addressed in the administrative record, transfer pursuant to Section 2347(b)(3) would facilitate resolution of those issues while respecting Congress's unambiguous determination that judicial review of deportation proceedings should await the entry of a final order.

Although the court of appeals concluded that transfer to a district court under Section 2347(b)(3) would not be available in a deportation case (see App. 12a-14a), nothing in the text of either the Hobbs Act or the INA supports that result. Indeed, as amended by IIRIRA, the INA specifically prohibits the reviewing court from invoking another provision of the Hobbs Act that allows for an alternative means of resolving disputed factual issues, namely by remanding the case to the agency under 28 U.S.C. 2347(c). See 8 U.S.C. 1252(a) (1) (Supp. II 1996). That specific bar to the use of one Hobbs Act mechanism in immigration cases confirms that Congress did not intend to bar a transfer to the district court under Section 2347(b)(3). What is entirely clear, moreover, is that Congress intended to foreclose *all* judicial review of deportation proceedings until the entry of a final order of deportation. That was an integral feature of the pre-IIRIRA regime,

see pp. 13-15, *supra*, and it has been made explicit in new Sections 1252(g) and 1252(b)(9) (discussed in note 6, *supra*). Consistent with that manifest congressional intent, and because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States," *Stone*, 514 U.S. at 400, the INA's judicial review provisions must be construed not to countenance respondents' now ten-year-old challenge to the mere institution of deportation proceedings.

3. The court of appeals also concluded that any judicial review that might be available following the entry of a final order of deportation "would not provide a sufficient avenue for review of the [respondents'] claims in this case." App. 14a. Relying on its decision in *AADC II*, the court asserted that "*prompt* judicial review of the [respondents'] claims [i]s required because violation of [respondents'] First Amendment interests would amount to irreparable injury that cannot be vindicated by post-deprivation remedies." App. 15a (internal quotation marks omitted). That reasoning is erroneous.

The court of appeals failed to explain how deferral of respondents' selective enforcement claims until the completion of administrative proceedings could effect an impermissible impairment of their First Amendment rights. Any burden or expense that the administrative process itself may entail does not constitute irreparable harm. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980); see also *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 264-270 (1982) (per curiam) (claim of prosecutorial vindictiveness is not subject to interlocutory appeal because the right not to be subject to vindictive prosecution may be adequately protected by review of a final judgment of conviction). Nor is there any reason to suppose that respondents' exercise of First Amendment rights would be significantly "chilled" by the pendency of deportation pro-

ceedings. Respondents' continued association with the PFLP during the pendency of the deportation process could not reasonably be expected to affect the ultimate disposition of the already pending deportation charges or their selective enforcement challenge to those charges.[7] Denial of immediate judicial review therefore will not subject respondents to any substantial harm. In any event, any harm that respondents may suffer is greatly outweighed by the paramount interest in the expeditious removal of deportable aliens.

D. The court of appeals' jurisdictional ruling warrants review by this Court. That ruling squarely conflicts with the Third Circuit's decision in *Massieu*, which ordered the dismissal of a constitutionally based district court challenge to deportation proceedings, specifically including a First Amendment selective enforcement claim. Moreover, other courts of appeals, in contrast to the decision below, have applied Section 1252(g), as added by IIRIRA, according to its terms and ordered dismissal of constitutional challenges in district court to deportation decisions. See *Ramallo*, *supra*, and *Auguste*, *supra*. The proper application of Section 1252(g) is an issue of recurring importance, as evidenced not only by the certiorari petitions in this case and *Ramallo*, but also by a third case pending before the Court in which the same jurisdictional issue is raised in our response (at 14-17) to the certiorari petition. See *Igbonwa* v. *United States*, No. 97-6518.

II. The court of appeals also concluded that respondents had established a substantial likelihood of success on the merits of their suit. That holding rests on the court's

---

[7] Federal law now prohibits citizens and aliens alike from contributing material support to the PFLP, see pp. 23-24, *infra*; the pendency of deportation proceedings is unlikely to create a meaningful additional disincentive to respondents' continued participation specifically in PFLP fundraising activities.

determinations that: (1) a United States citizen could not constitutionally be "targeted" for raising funds for a foreign terrorist organization unless he acted with specific intent to further the group's unlawful aims; (2) the First Amendment prohibits the United States Government from drawing distinctions among foreign organizations that advocate violence or destruction of property; and (3) any expressive or associational activity that would be constitutionally protected if engaged in by a U.S. citizen may not be considered by the INS in exercising its enforcement discretion with respect to the deportation of aliens. Those holdings cannot be reconciled with this Court's precedents, and they place unacceptable constraints on the ability of the political Branches to protect the national security, conduct foreign policy, and enforce the immigration laws.

A. In *AADC III*, the court of appeals stated that under the First Amendment, "targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals." App. 20a; see also App. 108a (*AADC II*). That assertion is erroneous.[8] The provision of material support to foreign terrorist organizations may constitutionally be subject to a blanket prohibition, regardless of the intent of the donor or fundraiser.

---

[8] The court of appeals in *AADC II* drew the "specific intent" requirement from this Court's decision in *Healy* v. *James*, 408 U.S. 169, 186 (1972). See App. 108a. In *Healy*, a university president denied recognition to a group of students who attempted to establish a local chapter of the Students for a Democratic Society (SDS). Although the students wished to use the SDS name, they stated that their group would not be affiliated with, and would remain completely independent of, the national organization. See *id.* at 172, 173 & n.3, 178, 186-187. *Healy* involved (at most) students' mere "association with an unpopular [domestic] organization." *Id.* at 186. The present case, by contrast, involves the provision of material support to a foreign terrorist organization.

To begin with, the extent to which the First Amendment is even implicated by the provision of material support to a foreign organization engaged in terrorist acts is uncertain at best. Even assuming that the First Amendment is implicated, however, the government's obvious and substantial interest in preventing the acquisition of material resources by foreign terrorists—an interest unrelated to the suppression of speech—plainly justifies any incidental burden on association that a prohibition on fundraising might entail. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

That point is made clear by *Regan* v. *Wald*, 468 U.S. 222 (1984), in which the Court upheld a Treasury Department regulation prohibiting any transaction involving property belonging to the government of Cuba or any Cuban national. See *id.* at 224. The plaintiffs in that case contended that the regulation unconstitutionally impaired their ability to travel. The Court acknowledged that the regulation "ha[d] the practical effect of preventing travel to Cuba by most American citizens," and that the Constitution in some measure protected such travel, but concluded that the ban was "justified by weighty concerns of foreign policy." *Id.* at 242.

The Court explained that "there [wa]s an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel." 468 U.S. at 243.[9] The Court observed that "[m]atters

[9] The regulatory ban upheld in *Regan* v. *Wald* was not directed at *donations* of money or property to Cuba or Cuban nationals, but applied to all commercial transactions. Because a purchaser of goods or services is typically indifferent as to the ultimate disposition of the funds once they have reached the seller, a requirement of specific intent to further particular aims of the Cuban government would have rendered that regulatory ban a practical nullity.

relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 242 (ellipsis and internal quotation marks omitted). The courts of appeals have consistently recognized that the substantial public and governmental interest in preventing the flow of currency to hostile nations is sufficient to justify the incidental burdens on expressive and associational activities that may result from a ban on travel or financial transactions.[10]

Congress has recognized that transfers of funds to foreign terrorist organizations, like transfers to hostile governments, may pose serious threats to U.S. national security and foreign policy interests. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L.

[10] See *Walsh* v. *Brady*, 927 F.2d 1229, 1235 (D.C. Cir. 1991) ("There is plenty of support for the Secretary [of State]'s argument that the interest in denying hard currency to embargoed countries such as Cuba is 'important' and 'substantial'"; ban on payments upheld despite district court finding that ban would impair plaintiff's ability to obtain posters from Cuba); *Veterans & Reservists for Peace in Vietnam* v. *Regional Comm'r of Customs*, 459 F.2d 676, 682 (3d Cir.) ("the Government has a compelling interest in regulating the flow of money to certain countries"), cert. denied, 409 U.S. 933 (1972); *Teague* v. *Regional Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968) (regulations "designed to limit the flow of currency to specified hostile nations [—] mainland China, North Korea, and North Vietnam [—] * * * contribute to the furtherance of a vital interest of the government"), cert. denied, 394 U.S. 977 (1969). See also *Farrakhan* v. *Reagan*, 669 F. Supp. 506, 512 (D.D.C. 1987) ("In the face of the national security interests lying behind [an Executive Order barring transactions with Libya], * * * there is no alternative that would allow organizations to speak through contributions while still allowing the government to effectuate its legitimate and compelling interests in national security."), aff'd mem., 851 F.2d 1500 (D.C. Cir. 1988).

No. 104-132, authorizes the Secretary of State to designate "foreign terrorist organization[s]." § 302(a), 110 Stat. 1248. The Act prescribes criminal penalties for any person within the United States or under the jurisdiction thereof who "knowingly provides material support or resources" to any organization so designated, and authorizes the Attorney General to seek injunctive relief to prevent violations. See § 303(a), 110 Stat. 1250. See also § 301(a)(1) and (a)(6), 110 Stat. 1247 (congressional findings that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States," and that "some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States"). Pursuant to the Act, the Secretary of State has designated the PFLP (along with 29 other groups) as a foreign terrorist organization. 62 Fed. Reg. 52,650 (1997).[11]

Taken to its logical conclusion, the court of appeals' decision suggests that PFLP fundraisers may not be subjected to *any* adverse consequence absent a showing of specific intent to further the PFLP's unlawful aims. That requirement would substantially impair the government's efforts to enforce the AEDPA's prohibition on the provision of material assistance to foreign terrorist organizations, and it is directly contrary to the congressional

[11] Even before the passage of the AEDPA, financial transactions between United States residents and the PFLP (and several other Middle Eastern terrorist organizations) had been prohibited by Executive Order. Executive Order 12,947 was issued on January 23, 1995, pursuant to, *inter alia*, the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* 60 Fed. Reg. 5079; see also 61 Fed. Reg. 1695 (1996) (continuing prohibition in effect); 62 Fed. Reg. 3439 (1997) (same); 63 Fed. Reg. 3445 (1998) (same). The Executive Order rests on a presidential finding that "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." 60 Fed. Reg. 5079.

finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7), 110 Stat. 1247.[12] The implications of the court of appeals' First Amendment analysis thus extend well beyond the context of deportation. Review by this Court is warranted to ensure that the court of appeals' aberrant constitutional holding does not impair the government's vigorous defense of the United States' national security and foreign policy interests.

B. In concluding that respondents were likely to succeed on their selective enforcement claims, the court of appeals in *AADC III* attached significance to the fact that "members of numerous other organizations advocating violence and the destruction of property were not deported." App. 18a; see also App. 15a n.5, 18a-19a. In *AADC II* the court sustained, as not clearly erroneous, the district court's selection of a "control group" comprised of "aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates." App. 106a. The thrust of the court's analysis was that the First Amendment would preclude the government from subjecting respondents to less favorable treatment than it accords to supporters of organizations within the control group.

[12] The specific intent of the fundraiser is obviously irrelevant to the harms posed by transfers of money to foreign terrorist organizations. Regardless of the fundraiser's intent, the organization remains free to use the money for violent purposes, including terrorist attacks against Americans. And "[e]ven if money contributed through fund raising activities is actually used for medical or other benign purposes, this frees up funds from other sources for use in supporting violent activities." C.A. E.R. 221 (declaration of Ambassador Philip Wilcox, Jr., then head of the State Department counter-terrorism office).

The comparative analysis in which the court of appeals engaged is wholly inconsistent with the proper role of the Judicial Branch. This Court has frequently emphasized the impropriety of judicial intrusion into the political Branches' conduct of foreign affairs. See, *e.g.*, *Regan*, 468 U.S. at 242 ("[m]atters relating to the conduct of foreign relations are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference") (ellipsis and internal quotation marks omitted); *Baker* v. *Carr*, 369 U.S. 186, 211 (1962) ("resolution of [foreign relations] issues frequently turn[s] on standards that defy judicial application, or involve[s] the exercise of a discretion demonstrably committed to the executive or legislature"). Just as "recognition of foreign governments * * * defies judicial treatment," *id.* at 212, no judicially manageable standards exist for determining whether other violent foreign organizations are "similarly situated" (App. 15a, 106a) to the PFLP.

In deciding whether various "foreign-dominated organizations advocating violence and destruction of property" (App. 21a) should be treated as terrorists, as freedom fighters, or as something in between, responsible officials in the political Branches must make nuanced assessments of a variety of moral, practical, and political considerations.[13] Those choices cannot be shirked by resort to a rule that all such groups must receive equivalent treatment from the United States Government. No principle of constitutional law supports the remarkable proposition that a violent foreign organization's hostility to U.S.

---

[13] In designating "foreign terrorist organizations" pursuant to the AEDPA, the Secretary of State is required to determine, *inter alia*, whether "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." AEDPA § 302(a), 110 Stat. 1248. The Act thus presupposes that the Secretary will distinguish among violent foreign organizations based on her assessment of relevant policy concerns.

interests may not be taken into account in determining whether U.S. residents will be permitted to furnish it with material support. The court of appeals' determination that such distinctions violate the First Amendment substantially and unjustifiably interferes with the political Branches' ability to protect the national security and to conduct the Nation's foreign policy.

C. For the foregoing reasons, a United States citizen has no First Amendment right to undertake the fund-raising activities in which respondents were believed to have engaged. *A fortiori*, there can be no constitutional bar to the INS's consideration of such activities in determining how its enforcement discretion will be exercised. But even if respondents had restricted themselves to forms of advocacy that would be constitutionally protected if engaged in by a citizen, their constitutionally based selective enforcement claim must fail. Because decisions regarding an alien's right to enter and to remain in this country are substantially entrusted to the political Branches, the court of appeals in *AADC II* erred in concluding that the constitutional principles applicable to citizens must apply in their entirety to the determination of which aliens will be deported.

In *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976) (footnotes omitted), this Court explained:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to

> the Judiciary. * * * Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

Accord, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government."); *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953) (this Court's decisions "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993); *Fiallo* v. *Bell*, 430 U.S. 787, 794-795 (1977); *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-590 (1952).

This Court has, in particular, permitted the deportation of aliens shown to have engaged in meaningful associational activities with foreign-dominated subversive groups. See, *e.g.*, *Galvan*, 347 U.S. at 528 ("support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation"); *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, 472 n.2 (1963) (under *Galvan*, "the absence of personal advocacy of violent overthrow is not by itself a bar to deportability"); see also *Scales* v. *United States*, 367 U.S. 203, 222 (1961) (observing that a statutory provision requiring deportation of alien members of the Communist Party, "which rested on Congress' far more plenary power over aliens, * * * did not press nearly so closely on the limits of constitutionality" as a similarly worded criminal

provision). The court of appeals' holding that respondents may not be subject to deportation proceedings absent a showing of specific intent to further the PFLP's unlawful aims cannot be reconciled with those decisions.

The courts of appeals likewise have recognized that the constitutional constraints that govern other congressional action cannot be mechanically applied to immigration decisions. The Fifth Circuit has stated that "[t]he constraints of rationality imposed by the constitutional requirement of substantive due process and of nondiscrimination exacted by the equal protection component of the due process clause do not limit the federal government's power to regulate either immigration or naturalization." *In re Longstaff*, 716 F.2d 1439, 1442-1443 (1983) (footnote omitted), cert. denied, 467 U.S. 1219 (1984). The Second Circuit has held that immigration legislation is reviewable only under a rational-basis standard even where it impinges upon a fundamental right. See *Azizi* v. *Thornburgh*, 908 F.2d 1130, 1133 (1990). And the D.C. Circuit has upheld a regulation, promulgated by the Attorney General at the President's direction, that imposed upon Iranian nationals special reporting requirements designed to verify their compliance with immigration laws. See *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (1979) (holding that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive," and "[s]o long as such distinctions are not wholly irrational they must be sustained"), cert. denied, 446 U.S. 957 (1982). Those decisions cannot be reconciled with the *AADC II* court's determination that "constitutionally protected activities that the Government cannot punish by means of a criminal statute are likewise beyond its reach in a deportation proceeding." App. 112a-113a.

Executive Branch officials have concluded that the PFLP's activities abroad pose a substantial threat to

American foreign policy and national security interests. The First Amendment does not preclude the government from considering an otherwise-deportable alien's material support for a hostile foreign organization in determining whether deportation charges should be filed. The court of appeals' contrary holding places unjustified limitations on the ability of Congress to determine which aliens will be permitted to remain in the United States, and on the discretion of the Attorney General in determining how to exercise her enforcement authority under the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
Attorney

JANUARY 1998